Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1888

EDWARD W. MAHER, COMMISSIONER OF INCOME MAINTENANCE, STATE OF CONNECTICUT,

Petitioner,

v.

VIRGINIA GAGNE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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November 1979

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals *(Pet. App., pp. 1a-18a)* is reported at 594 F.2d., 336.

The opinion of the district court *(A. 83-91)* is reported at 455 F. Supp. 1344.

JURISDICTION

The judgement of the court of appeals *(Pet. App., pp. 19a-20a)* was entered on March 9, 1979. Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 22, 1979. The petition for a writ of certiorari was filed on June 21, 1979, and was granted on October 1, 1979 *(A. 92)*, at which time the Court also granted respondent's motion for leave to proceed *in forma pauperis*. The jurisdiction of this Court rests upon 28 U.S.C. §1254(l).

QUESTIONS PRESENTED

1. Whether in an action combining a constitutional claim under 42 U.S.C. §1983 with a statutory claim under the Social Security Act, which is subsequently settled by entry of a consent decree, and the merits of the §1983 claim are never determined, an award of attorney's fees against the Connecticut Commissioner of Income Maintenance, in his official capacity, to be paid out of State funds, is authorized by the Civil Rights Attorney's Fees Awards Act of 1976.

2. Whether, as the Court of Appeals has alternatively ruled, the award of the attorney's fees against the State of Connecticut in this action was permissible as an "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651 (1974), and therefore not barred by the Eleventh Amendment.

STATUTES INVOLVED

United States Code, Title 42:

§602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must . . . (7) except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of any such income;

§1983. *Civil action for deprivation of rights*

Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§1988. *Proceedings in vindication of civil rights*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other

than the United States, a reasonable attorney's fee as part of the costs.
As amended Pub. L 94-559, §2, Oct. 19, 1976, 90 Stat. 2641.

STATEMENT

The plaintiff, a working recipient of public assistance under Connecticut's program of Aid to Families with Dependent Children (AFDC), brought this action in the United States District Court against the Commissioner of Social Services (now called Commissioner of Income Maintenance) in which she alleged that, in computing the amount of her monthly AFDC award, Connecticut's policies and practices governing of work-related expenses were in conflict with §402(a)(7) of the Social Security Act. 42 U.S.C. §602(a)(7). *Complaint, paragraph 37, A.4.*

Section 602(a)(7) provides, *inter alia*, that the State agency shall disregard ". . . any expenses [which are] reasonably attributable to the earning of any such income."[1]

More specifically, the plaintiff claimed that the State's regulations were being applied in a way that deprived her of the full amount of work-related expense deductions to which she was entitled, allegedly by setting maximum food and transportation (by private automobile) expenses. *Complaint, paragraphs 1, 2, 15 and 16, A.4, 7,* and by refusing to consider work-related clothing expenses. *Id., paragraph 17, A.8.*

The plaintiff claimed also that the Department's practices and policies violated the Equal Protection Clause of the Fourteenth Amendment because they resulted in "invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 . . . by forbidding

[1]The pertinent federal regulation, 45 C.F.R.§233.20(a) (3)(iv)(a), provides that, in determining the availability of income and resources, ". . . [i]ncome equal to expenses reasonably attributable to the earning of income . . ." will not be included as income.

plaintiff and the class she represents[2] ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances on Index 332.31 are unreasonable." *Complaint, paragraph 28, A.9.*

Plaintiff claimed further that the Department's practice and policy violated the Due Process Clause of the Fourteenth Amendment in that they ". . . establish an irrebutable presumption that the plaintiff's work-related transportation and lunch allowances are unreasonable and operate to deny plaintiff and the class she represents a fair opportunity to rebut it," and that "[t]he standard lunch and transportation allowances . . . are arbitrary in that they were not developed by a statistically fair averaging, nor do they reflect current prices. *Complaint, paragraph 32, A.10.*

The complaint also recited that the bringing of this action in the federal district court was authorized, *inter alia*, under 42 U.S.C. §1983, and that jurisdiction was conferred by 28 U.S.C. §1343. *Complaint, paragraphs 3-4, A.5*

Prior to instituting this action in federal district court, plaintiff requested an administrative fair hearing pursuant to §17-2a, Connecticut General Statutes to contest the Department's disallowance of the allegedly work-related food, transportation and clothing expenses which she subsequently choose to contest in this action.[3] *Memorandum of Decision, Adm. Fair Hearing, A. 14-16.*

The administrative fair hearing memorandum of decision

[2]This action was not certified as a class action until the Consent Judgment (A.76) was entered, and, in that judgment the class was not defined. There was never more than a single party-plaintiff (Virginia Gagne) in the action throughout the proceedings in the district court. (footnote not in original text).

[3]In the administrative hearing, plaintiff claimed, additionally, that she was entitled to claim her 16 year old son's work expenses. Thereafter, she apparently abandoned this latter claim.

upheld the Department's decision disallowing plaintiff's claims for additional work-related lunch and transportation expenses, but directed the district office to "assess the actual needs of the appellant's work connected clothing expense and to allow those as actual expenses." (A.16)

The plaintiff, through her attorneys then appealed the administrative hearing decision to the state Court of Common Pleas, pursuant to §17-2b, Connecticut General Statutes.[4]

During the pendency of this action, both sides employed discovery techniques. The defendant filed interrogatories; the plaintiff filed two sets of interrogatories, took a deposition and filed a request for admission.

The defendant, on May 29, 1975, while this action was pending, amended the regulation initially under challenge herein, Index 332.31, revised September 11, 1973. (A.65) The amended regulation provided expressly for deduction of any expenses reasonably attributable to earning of income. (A.67). Thereafter, plaintiff filed interrogatories, presumably to ascertain the significance of the defendant's revised Index 332.31, *supra*.

In September, 1976, plaintiff filed an amended complaint which was very similar to the original complaint, but containing additional allegations that the Department's new policy, as implemented allegedly still resulted in routine disallowances of expenses in excess of standard allowances (Amended Complaint, paragraph 26, A.59); and a new second cause of action that the Department's practices did not result in properly informing AFDC recipients of their right to claim work- related

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[4]Thereafter, this action was instituted in U.S. District Court. That appeal remained pending in the state court throughout the entire period of this action in the federal district court. After entry of the consent judgment herein, plaintiff "revived" that appeal and it is still an active case. The defendant has moved to dismiss on the grounds that the consent decree entered in this action is *res judicata*. A decision is still awaited on that motion.

expense deductions other than those specified in department policy, nor in properly informing them whether or not their claimed work-related expenses had been allowed, nor in properly notifying recipients of their right to challenge the Department's determinations on claims for work-related expense deductions. (A61-62). The defendant denied these allegations.

Eventually, after negotiations between the parties, and the exchange of several proposed drafts, a consent decree (A.76) was entered on March 2, 1977, and, thereafter, on April 4, 1977, the plaintiff moved for an award of attorney's fees pursuant to The Civil Rights Attorney's Fees Awards Act of 1976, *supra*.

A hearing on the motion was held on May 16, 1977; and on August 1, 1978, the district court, which, presumably, had been awaiting the Supreme Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978), entered its ruling awarding attorney's fees against the State in the amount of $3,012.19 to plaintiff's attorneys. The State thereupon appealed that decision to the U.S. Court of Appeals (2nd Circuit); and the respondent cross-appealed the district court's reduction of the amount of the attorney's fees they had requested.

The Court of Appeals affirmed the district court's award of attorney's fees to the plaintiff's attorneys; and remanded on the respondent's cross-appeal.

The State-Petitioner's petition for certiorari was granted by this court on October 1, 1979.

SUMMARY OF ARGUMENT

I. The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, amending and codified in 42 U.S.C. §1988, does not and cannot, under the circumstances present in this case, serve as congressional authorization for an award of attorney's fees against the State of Connecticut, because under this Court's holding in *Fitzpatrick v. Bitzer*, 427 U.S. ,445 (1976), before Congress can abrogate a State's Eleventh

Amendment immunity, it must be acting pursuant to §5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Therefore, as explained *infra*, since the "threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent," *Edelman v. Jordan*, 415 U.S. 651, 672, the award of attorney's fees in this case is barred by the Eleventh Amendment.

In *Hutto v. Finney*, 437 U.S. 678 (1978) this Court did uphold an award of attorney's fees against the State of Arkansas which had been made by the court of appeals under the authority of the Fees Act. But in that case it had been found that conditions in the Arkansas prison system constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments.

This is not such a case. This is a case (as was Edelman v. Jordan, supra) brought under 42 U.S.C. §1983 in which the underlying claim is based upon Social Security Act provisions dealing with the Aid to Families with Dependent Children (AFDC) program. The decision in this case was entered on March 9, 1979, before this Court released its decision in *Chapman v. Houston Welfare Rights Organization*, ___ U.S. ___, 99 S. Ct. 1905 (May 14, 1979), and, consequently, the court of appeals did not have the benefit thereof.[5]

In *Chapman, supra*, this Court has held, while discussing jurisdictional problems presented by that case, that §1983, standing alone, provides no protection for civil rights since it does not provide for any substantive rights at all. ___ U.S., at ___, 99 S. Ct., at 1916. *Chapman*, further provides, *inter alia*, that:

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[5]A motion to re-argue before the court of appeals would have served no purpose however, since, in its decision, the court of appeals upheld the district court's award of attorney's fees on the alternate ground that it was but a permissible "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651, (1974), as is discussed *infra*.

> "It is only when the underlying statute is *not* a civil rights act that § 1983 need be invoked by those in claimant's position to support jurisdiction. And in such cases by hypothesis, §1983 does not provid[e] for the protection of civil rights." *Id.* (emphasis added).

Therefore, before it can be determined whether or not plaintiff's claim is one seeking to enforce a substantive guarantee of the Fourteenth Amendment,[6] reference must be made to the Act of Congress which forms the underlying substantive basis for the §1983 claim. In this case, as indicated *supra*, that Act is the Social Security Act. *Chapman, supra*, tells us further that the Social Security Act does not deal with the concept of "equality" or with the guarantee of "civil rights" as those terms are commonly understood. ___ U.S., at ___, 99 S. Ct. at 1917.

It must therefore be concluded that when the plaintiff in this action brought a §1983 claim in which the underlying claim was based on the Social Security Act, she was *not* attempting to enforce a substantive guarantee of the Fourteenth Amendment. Therefore, the Fees Act cannot supply "the threshold fact of congressional authorization" under which the State's Eleventh Amendment immunity could be abrogated.

II. Even if the Fees Act, notwithstanding the foregoing analysis, were found to authorize an award of attorney's fees against a State in an action combining a §1983 claim with a statutory Social Security Act claim, as the court of appeals has held in this case, the plaintiff should not have been adjudged to be "the prevailing party" under the Fees Act, since she did not obtain the relief she sought when she claimed that the State had improperly disallowed certain of her work-related expenses for food, clothing and transportation.

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[6]Which is the necessary requisite under *Fitzpatrick v. Bitzer, supra*, to empower Congress to abrogate a State's Eleventh Amendment immunity.

The plaintiff requested and received an administrative fair hearing on these claims in which the Department's decision was upheld. The court of appeals rejected the State's claim that the administrative hearing decision was *res judicata* on this issue (Pet. App., p. 13a, n.7), but that decision is nonetheless highly probative evidence as to the lack of merit in the plaintiff's claim; and the plaintiff attached that hearing decision as an exhibit to her complaint. *A. 14.*

III. The court of appeals has upheld the district court's award of attorney's fees against the State in this case on the additional ground that the Eleventh Amendment is no bar to such an award because it "fits within the 'ancillary effect' doctrine [of Edelman v. Jordan, supra] when the award is incident to a judgment granting prospective relief." *Pet. App. p. 10a.*

The "ancillary effect" doctrine was carefully defined by this Court in *Edelman* when it explained therein that a court order limited to prospective injunctive relief may nevertheless require state officials to expend money from the state treasury in complying with such a decree. In such a case, the Court pointed out, "the fiscal consequences to state treasuries in these cases were *the necessary result of compliance with decrees which by their terms were prospective in nature* . . . . [s]uch an *ancillary effect* on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*" 415 U.S., at 667, 668 (emphasis added).

In upholding the district court's award of fees against the State in this case, the Second Circuit appears to have, unwarrantedly, expanded the "ancillary effect" doctrine of *Edelman* to include a situation "when the award is incident to a judgment granting prospective relief." *Pet. App., p. 10a.* Clearly, the award of fees in this case was *not* "the necessary result of compliance [with a] decree[s] which by . . . [its] terms . . . [was] prospective in nature."

ARGUMENT

I.

THE FEES ACT DID NOT SUPPLY, IN THIS CASE, THE "THRESHOLD FACT OF CONGRESSIONAL AUTHORIZATION" WHICH IS NECESSARY TO ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY.

A. *The Impact of Chapman v. Houston Welfare Rights Organization* ___ U.S. ___, 99 S. Ct. 1905, *On the Court of Appeals Decision.*

In *Edelman v. Jordan*, 415 U.S. 651 (1974) this court held that retroactive welfare benefits awarded to plaintiffs by a federal district court by reason of a wrongful denial of benefits by Illinois officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment. The Court stated, *inter alia*, that "[T]hough a §1983 action may be instituted by public aid recipients . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include retroactive award which requires the payment of funds from the state treasury . . ." 415 U.S., at 676-677.

The court of appeals, in upholding the award of fees against the State in this case, held, *inter alia*, that although the Eleventh Amendment generally bars federal court awards of compensatory relief to be paid from a State treasury, "it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails [under the Fees Act] as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts." *Pet. App. p. 12a.*

The Petitioner submits that the prior decisions of this Court do not support this holding of the court of appeals; and that the holding, in effect, circumvents the decision of this Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Subsequent to *Edelman*, this Court held in *Fitzpatrick v. Bitzer, supra*, that Congress has the power, when acting pursuant to §5 of the Fourteenth Amendment, to enact legislation authorizing federal courts to award attorney's fees against a State as a means of enforcing that Amendment's substantive guarantees. In so doing, however, the Court distinguished that case from *Edelman v. Jordan, supra*, when it stated that "[O]ur analysis [in Fitzpatrick] begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' 415 U.S., at 672, to sue the State as employer is clearly present." 427 U.S., at 452.

More recently, in *Hutto v. Finney*, 437 U.S. 678 (1978), an award of attorney's fees to be paid from funds of the State of Arkansas awarded by the Court of Appeals pursuant to the Fees Act, *supra*, was upheld by this Court. However, in *Hutto*, it was found that conditions in the Arkansas prison system constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments. The instant case is distinguishable from *Hutto* in that there was no finding of a deprivation of any of plaintiff's constitutional rights.

Moreover, this Court itself, in *Hutto*, distinguished that case from *Edelman v. Jordan, supra*, when it stated, *inter alia:*

> ". . . [F]inally, the claims asserted in *Employees* and in *Edelman v. Jordan* . . . were based on a statute rooted in Congress Art. I power . . . *Edelman v. Jordan, supra*, at 674 (underlying claim based on Social Security Act provisions dealing with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385). In this case, as in *Fitzpatrick v. Bitzer*, 427 U.S. 445, the claim is based upon a statute enacted to enforce the Fourteenth Amendment . . . ."
> 437 U.S., at 698 n. 31.

The factual situation in the present case is very similar to

Edelman (except that it is an award of attorney's fees rather than retroactive welfare benefits which is at issue) in that it is an action brought by a recipient of public welfare benefits under 42 U.S.C. §1983 in which a constitutional claim has been combined with an underlying statutory claim based upon the Social Security Act. In *Edelman* the underlying claim dealt with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385, whereas in this action the claim deals with aid to families with dependent children (AFDC) 42 U.S.C. §601, *et seq*. It is submitted, therefore, that this case should be controlled by this Court's decision in *Edelman* and not by the decision in *Hutto v. Finney, supra*, since in this case, as in *Edelman*, the plaintiff was not seeking to enforce any of her "civil rights" under the Fourteenth Amendment — she was merely challenging the alleged disallowance of certain work-related expenses under the AFDC program.

In *Edelman v. Jordan, supra*, merely because the action was brought under §1983 and an equal protection claim was combined with the underlying statutory claim, there is no indication therein that the Court viewed the action as one involving the enforcement of "civil rights." The Court indicated that a State's Eleventh Amendment immunity is not lost in such a case when it stated:

> "[I]t is of course true that *Rosado v. Wyman* 397 U.S. 397 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself . . . ."
> 415 U.S., at 676, 677.

Just recently in *Chapman v. Houston Welfare Rights Organization*, 47 U.S.L.W. 4528, (May 15, 1979), this Court in

discussing jurisdictional questions presented by that case, shed further light upon "civil rights" actions brought under §1983 when it stated, *inter alia:*

> "Under §1343(3) [of 28 U.S.C.], a civil action must be both 'authorized by law' and brought to redress the deprivation of rights 'secured by the constitution or by an Act of Congress providing for equal rights.' Section 1983, when properly invoked, satisfied the first requirement: it ensures that the suit will not be dismissed because not 'authorized by law.' But it cannot satisfy the second, since by its terms, as well as its history, it does not provide any rights at all.
>
> "We reach a similar conclusion with respect to the argument that §1983 is a statute 'providing for the protection of civil rights, including the right to vote'. Standing alone, §1983 clearly provides no protection for civil rights since, as we have just concluded, §1983 does not provide any substantive rights at all. To be sure, it may be argued that §1983, does in some sense 'provid[e] for the protection of civil rights' when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke §1983 to meet the 'civil rights' requirements of §1343(4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It is only when the underlying statute is *not* a civil rights act that §1983 need be invoked by those in claimants' position to support jurisdiction. *And in such cases, by hypothesis, §1983 does not 'provide[e] for the protection of civil rights.'* "

(Emphasis added, footnote omitted). ____ U.S., at ____, 99 S. Ct., at 1916.

Further along in its opinion, the Court went on to state, *inter alia:*

> "[T]he Social Security Act does not deal with the concept of 'equality' or with the guarantee of 'civil rights,' as those terms are commonly understood . . ." *Id.*, ____ U.S., at ____, 99 S. Ct., at 1917.

And, near the close of its opinion, the Court stated:

> ". . . the courts of appeals have consistently held that the Social Security Act is not a statute providing for 'civil rights' . . . [W]e endorse those holdings, and find that a similar conclusion is warranted with respect to §1343(4) as well . . ." *Id.*, ____ U.S., at ____, 99 S. Ct., at 1918.

It is true, of course, that unlike the plaintiffs in *Chapman, supra,* the plaintiff in this action *did* recite in her complaint, separate constitutional claims. (Set forth supra, at p.4). But these "constitutional" claims are themselves based upon the provisions of the Social Security Act., and were it not for the existence of §602(a)(7) of the Act, the recital of these "constitutional" claims would be meaningless.

It has become customary for a plaintiff in a case where the underlying claim is based on the Social Security Act, to set forth in the complaint at least one "equal protection" claim and/or one "due process" claim, and to recite that the action is brought under 42 U.S.C. §1983. The complaint then proceeds to set forth the underlying Social Security Act "statutory" claim. Under the liberal "substantiality" test of *Hagans v. Lavine,* 415 U.S. 528, (1974), there is then little chance that the complaint will be susceptible to a motion to dismiss for a lack of federal court jurisdiction.

In *Chapman, supra,* Mr. Justice Stewart took note of this practice in a dissenting opinion when he observed:

> "[F]inally, even a welfare recipient with a federal statutory claim may sue in federal court if his lawyer can link this claim to a substantial constitution contention. And under the standard of substantially established by *Hagans v. Lavine*, 415 U.S. 528, such a constitutional claim would not be hard to construct." ____ U.S., at ____, 99 S. Ct., at 1946.

In *Hutto v. Finney, supra*, it was stated, *inter alia*, that when it passed the Fees Act, "Congress undoubtedly intended to exercise that power [the plenary power it has to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment] and to authorize fee awards payable by the States when their officials are sued in their official capacities" (437 U.S., at 693-694). After this Court's opinion in *Chapman, supra*, that statement does not appear to be analytically correct, at least when referring to §1983 actions. Just as §1983 by itself (as pointed out in *Chapman,)* "provides no protection for civil rights since . . . [it] does not provide any substantive rights at all," the Fees Act, §1983, by itself, does not import "the threshold fact of congressional authorization," *Fitzpatrick v. Bitzer, supra*, into a claim asserted under §1983. As *Chapman* instructs, §1983 *authorizes* a cause of action to be brought thereunder, but the Act of Congress which is thereby imported into a §1983 action must itself contain the actual substantive basis of the civil rights guarantee before the Fees Act can be said to provide the authorization for the award of attorney's fees against the State.

In this case the Social Security Act, the underlying claim in the plaintiff's §1983 action, clearly provided no substantive basis to enforce a Fourteenth Amendment guarantee. Under this analysis, it was incorrect for the court of appeals to find, in this case, a congressional intent, under the Fees Act, to authorize an award of attorney's fees against the State.

B. *The Legislative History Of the Fees Act.*

It would appear from the foregoing discussion that it is unnecessary to refer to the legislative history of the Fees Act in order to determine the congressional intent contained therein. But if that history is to be consulted, there are several factors which militate against finding, in the Fees Act, an intent by Congress to authorize an award of attorney's fees against the State under the circumstances of this case.

The court of appeals relied heavily, in its decision, on the House Report, H.R. Rep. No. 1558, 94th Cong., 2d. Sess. at 4 n. 7 (1976), *Pet. App., p. 7a,* which mentioned specifically a situation where a plaintiff joins a claim under one of the statutes enumerated in the Fees Act with a claim that does not allow attorney's fees, and prevails on the non-fee claim. The *Senate* Report, No. 94-1011, however, contains no such language, and, it is to be noted, it was the *Senate* Bill which was passed in *lieu* of the House Bill. *1977 U.S. Code Cong. & Adm. News*, p. 6338. Moreover, there is no indication in the *Senate* Report that Congress intended to treat welfare benefits cases brought under the Social Security Act as "civil rights" cases. The types of cases specifically mentioned in the Senate Report include cases involving racial discrimination, voting rights, public accomodation, housing discrimination, and discrimination in a private restaurant. There is no mention of cases brought to enforce claims to public welfare benefits under the Social Security Act. *Id.*, pp. 6340-6342.

The *purpose* of the Fees Act, as stated in the Senate Report is "to remedy anomolous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 1975, and to achieve consistency in our civil rights laws." *1977 U.S. Code Cong. & Adm. News*, p. 6339. There is no indication here that Congress was attempting to transform a claim brought under the Social Security Act into a civil rights case.

Another difficulty presented by ascribing to Congress such an intent is that presented by the requirement of 28 U.S.C. §2281[7] that, in an action such as this one, a three-judge court was required to hear the plaintiff's claim which sought to enjoin the State's regulation on the grounds of its unconstitutionality. Indeed, the plaintiff requested in her complaint that a three-judge court be convened pursuant to 28 U.S.C. §§2281, 2284. (A.5), but such a court was never convened. Instead, a single-judge court dealt with the problems of discovery and accepted and entered judgment on the consent decree. This was perfectly permissible under the doctrine of *Hagans v. Lavine, supra,* so long as only the "statutory" claim was being considered. It thus appears clear that the plaintiff could not have prevailed on her constitutional claims since the requisite convocation of a three-judge court under §2281 never came into being. The single-judge court was empowered to act only on the plaintiff's "statutory" claim.

C. *The Plaintiff Should Not Have Been Adjudged The Prevailing Party" Even On Her Statutory Claim.*

The district court, in rejecting the State's claim that the plaintiff was not the prevailing party in this case found that, through the consent decree the plaintiff received substantially all of the relief she originally sought in her complaint and "thus she is entitled to an attorney's fee even though she did not prevail in every particular." *(A.87)*

However, the plaintiff, prior to bringing this action requested and received an administrative fair hearing on the disallowed items of work-related expenses of food, private automobile mileage allowance and clothing which formed the crux of her claim, (Complaint, paragraphs 12-18, *A. 7-8)* that

[7]§2281 of Title 28 U.S.C. was not repealed until August 12, 1976 well after this action was brought. The repeal of §2281 was not applicable to any action commenced on or before August 12, 1976, under §7 of Public Law 94-381

the State's policies and practices were in conflict with the requirement of (42 U.S.C. §602(a)(7) that she be allowed all deductions reasonably attributable to the earning of income. At the administrative hearing the Department's decision was upheld. *A. 14-16.* That decision does not make clear whether the Department would allow plaintiff to show she incurred work-related expenses in excess of the Department's standard allowances, or whether the plaintiff failed to prove she actually had such expenses. The plaintiff's attorney's claimed the former, and the State claimed the latter was the case.

It cannot be disputed however, that when the State sought, in this action, corroboration of the plaintiff's automobile mileage expenses by means of interrogatories, the plaintiff was unable to provide the needed information on her odometer reading and monthly usage. *Answers to Interrogatories, Questions 15, 26, A. 23, 24.*

At the time the consent decree was entered, plaintiff abandoned her claims for additional food and clothing expenses. The Department did agree to increase *prospectively,* beginning in March, 1977, it *standard allowance*[8] for mileage (the amount paid without requiring proof thereof) for private automobile use, from $.06 to $.12 cents a mile *(A. 77-78),* and to use a more elaborate and informative notice of work-related expenses allowed to a recipient, and a more detailed explanation of how they had been computed. *A. 80-82.*

However, most of the provisions of the consent decree were restatements of what federal law required and what the Department claimed it had been doing all along.

It appears to be plaintiff's view that she had established that she had prevailed on her claim that the Department did not

[8]However, under *Shea v. Vialpando,* 416 U.S. 251, (1974) the Department was not *required* to establish any such standard allowances but "a standard allowance would be permissible, and would substantially serve petitioners' inerests in administrative efficiency, if it provided for individualized consideration of expenses. 416 U.S. at 265.

allow a recipient to prove work-related automobile mileage expenses in excess of the Department's standard allowance because, even after the Department amended its policy to provide expressly for any expenses attributable to earning income *(A.67)*, its subsequent answers to plaintiff's interrogatories showed that, in a survey of two district offices, virtually no recipients were given automobile mileage expense greater than the standard allowance. The fallacy of this inference is, of course, that the plaintiff did not ask how many recipients *claimed* expenses greater than that allowance. Without that additional information, the first answer is not very significant.

What does appear to be significant, however, is that during the entire period during which this action was pending there was only a single plaintiff as a party, and there were no intervenors, a situation that fails to lend credence to the merits of the plaintiff's claims.

Finally, it should be noted that when this litigation ended in a consent decree the State was not required, under its provisions, to change in any way its policy governing deductions for work-related expenses contained at Index 332.31. *A.67*, which was adopted prior to the filing of the plaintiff's amended complaint.

II.

THE PORTION OF THE DECISION BELOW WHICH HOLDS THAT THE AWARD OF ATTORNEY'S FEES AGAINST THE STATE WAS A PERMISSIBLE "ANCILLARY EFFECT" OF A DECREE LIMITED TO PROSPECTIVE INJUNCTIVE RELIEF IN A MISINTERPRETATION OF THIS COURT'S OPINION IN EDLEMAN V. JORDAN.

In *Edelman*, this Court explained that a court order limited to prospective injunctive relief may nevertheless require state officials to expend money from the state treasury in complying with such a decree: "[b]ut the fiscal consequences to state treasuries in these cases were *the necessary result of compliance with decrees which by their terms were prospective in nature* . . . [s]uch an *ancillary effect* on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*" 415 U.S., at 667-669 (emphasis added).

The court of appeals has held in this case that "an award of attorney's fees fits within the 'ancillary effect' doctrine[9] [of Edelman, supra,] when the award is incident to a judgment granting prospective relief" *Pet. App., p. 10a*, and goes on to state, *inter alia*, that the Supreme Court in a pre-*Edelman* summary decision, affirmed a three-judge court award of attorneys' fees against a state in *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), 409 U.S. 942 (1972); and that, in the Second Circuit "summary holdings of the Supreme Court are binding precedent." *Pet. App., p. 11a.*

But this Court has noted in Quern v. Jordan, ____ U.S. ____, ____, 99 S. Ct. 1139, 1143 n.5 (1979) that the list of summary affirmances overruled in *Edelman* was not intended to be exhaustive.

In *Edelman*, it was stated that the court's order requiring the State of Illinois to make retroactive payment to plaintiffs in that case was *not* "a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation to those whose applications were processed on the slower time schedule *at a time when petitioners were under no court- imposed obligation to conform to a different standard." 415 U.S., at 668 (emphasis added)*. That statement is also true of the award of fees made against the State of Connecticut in the present case.

It is submitted that the award of attorney's fees entered by the distrct court in present action does *not* come within this Court's careful definition, *supra*, of an "ancillary effect." The Second Circuit has extended this Court's "ancillary effect" doctrine to include a situation "when the award is incident to a judgment granting prospective relief." *Pet. App., p. 10a.*

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[9]The court of appeals has pointed out that the circuits are divided on this issue, *Pet. App., p. 10a, n.4*

CONCLUSION

The judgment of the court of appeals, insofar as it affirmed the decision of the district court awarding attorney's fees to the plaintiff should be reversed, *Pet. App., p. 20a,* and the order of the court of appeals remanding respondent's cross-appeal vacated, and the cross-appeal dismissed.

Respectfully submitted,

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